

SERVICE DATE – LATE RELEASE NOVEMBER 1, 2004

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-872X

GREAT NORTHWEST RAILROAD, INC.–ABANDONMENT EXEMPTION–IN  
CLEARWATER COUNTY, ID

Decided: November 1, 2004

By petition filed on July 14, 2004, Great Northwest Railroad, Inc. (GNR) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a line of railroad extending from milepost 3.5 at Orofino, to milepost 31.0, near Jaype, a total distance of 27.5 miles, in Clearwater County, ID. Notice of the filing was served and published in the Federal Register on August 3, 2004 (69 FR 46624). A request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) was filed by the Board of Clearwater County Commissioners (Clearwater County). We will grant the petition for exemption, subject to trail use, public use, environmental, and standard employee protective conditions.

BACKGROUND

According to GNR, no traffic has moved over the line since June 2001 and a majority of the line is out of service. GNR states that the largest shipper on the line in recent decades was Potlatch Corporation (Potlatch), which shipped approximately 20,000 carloads of logs and finished plywood annually in the early 1980s, 8,000 carloads annually in the early 1990s, and 3,500 carloads annually in the late 1990s. Petitioner adds that Potlatch stopped using the line in June 2001, demolished its plywood mill at Jaype, and shifted its traffic to trucks. GNR indicates that three other shippers made minimal use of the line in the past 15 years: Chevron shipped 4 to 5 carloads of diesel fuel annually until about 10 to 15 years ago; Idaho Lime shipped a total of 5 to 10 carloads of lime prior to 1998; and Atlas Sand and Gravel shipped approximately 10 carloads of magnesium chloride annually until 2001.

Although the line had been out of service for nearly 3 years when GNR acquired it in February 2004, GNR states that at that time it was still in discussions with potential customers to see if adequate traffic volumes could be developed to justify the cost of reopening and operating the line. GNR claims that it was not able to obtain adequate traffic commitments to justify the expense of reopening the line, and it has thus sought an exemption authorizing its abandonment. GNR states that, at a public hearing concerning this abandonment held on June 28, 2004, a few witnesses testified about potential industries that could locate along the line if rail service were retained, but GNR maintains that the identified industries could just as easily locate on GNR's nearby active rail lines. After its

discussions with potential customers, GNR has concluded that the line is not economically viable now and has no potential of being profitably operated in the foreseeable future.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving GNR of the expense of maintaining a line that is no longer used and allowing it to use its assets more productively elsewhere on its system. [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. The line has been out of service for 3 years and there are no active shippers located on the line. Nevertheless, to ensure that any former shippers that are still located on the line are informed of our action, we will require GNR to serve a copy of this decision and notice on each of them within 5 days of the service date and to certify to us that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

GNR has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed action. See 49 CFR 1105.11. The Board's Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on September 10, 2004.

In the EA, SEA states that the National Geodetic Survey (NGS) has advised SEA that 24 geodetic station markers have been identified along the rail line that may be affected by the proposed abandonment. Therefore, SEA recommends a condition requiring GNR to notify NGS 90 days prior to salvage activities that may disturb or destroy the geodetic station markers located on the line.

SEA also states in the EA that the U.S. Army Corps of Engineers, Walla Walla District (USACE), advised that it had not been able to determine if additional review is required by it, and recommended that GNR have a qualified wetland consultant inspect the project area. Therefore, SEA recommends a condition requiring GNR to consult with the USACE prior to commencement of any salvage activities to determine if permits are required under section 404 of the Clean Water Act (33 U.S.C. 1344), and to report the results of this consultation to SEA.

SEA also states in the EA that the U.S. Environmental Protection Agency, Region 10 (EPA) has stated that the proposed abandonment appears to involve clearing, grading, and excavation activities that are likely to result in the discharge of pollutants in storm water runoff from more than one acre of land. Thus, the EPA believes that the proposed activity is subject to the permitting requirements of the National Pollutant Discharge Elimination System (NPDES) program under section 402 of the Federal Clean Water Act, which would require GNR to obtain a NPDES permit and develop a Storm Water Pollution Protection Plan. SEA states that the Idaho Department of Environmental Quality (IDEQ) made similar recommendations. Therefore, SEA recommends that GNR be required to contact the EPA (Misha Vakoc at 206-553-6650) and the IDEQ prior to commencement of any salvage activities.

SEA also states in the EA that several railroad structures are situated in, over, or near Orofino Creek and its tributaries, over which IDEQ and the Idaho Department of Water Resources (IDWR) have regulatory authority. IDWR administers the Idaho Stream Protection Act and has expressed concerns regarding: (1) the removal of structures currently situated in Orofino Creek or its tributaries; (2) crossing Orofino Creek or its tributaries with equipment; (3) any activity that could introduce sediments into Orofino Creek or its tributaries; and (4) fisheries in Orofino Creek. IDWR stated that, if salvage activities would affect land below the ordinary high water mark of Orofino Creek or its tributaries, GNR should comply with state and Federal regulations regarding permitting and protocol. Therefore, SEA recommends a condition requiring GNR to consult with IDWR regarding the potential need for any permits.

Additionally, SEA states in the EA that, because the proposed abandonment involves stream crossings and drainages with potential discharge to Orofino Creek and the Clearwater River, IDEQ has

expressed concerns<sup>1</sup> regarding water quality protection; the removal and salvage methods to be used by GNR during the proposed abandonment; sediment and erosion control; bridge and culvert maintenance; procedures to prevent leaching of wood preservatives from treated wood surfaces; procedures to identify and clean up debris and contaminated areas; and a hazardous material contingency plan that includes IDEQ notification, in the event hazardous substances are discovered during salvage activities. IDEQ is also concerned that certain state regulations, specifically Idaho's Water Quality Standards and Wastewater Treatment Requirements (Idaho Administrative Rules 50.01.02), would be violated if the structures collapse into the water, and IDEQ recommended that these structures be salvaged or maintained. To adequately address these concerns, SEA recommends a condition requiring that GNR contact IDEQ prior to commencement of any salvage activities.

GNR has submitted a historic report, and has served the report on the Idaho Historical Society (SHPO). See 49 CFR 1105.8. SEA states in the EA that the SHPO has not yet completed its assessment of the proposed abandonment. In letters dated June 10, and August 12, 2004, the SHPO requested archeological and historical surveys of the line. While the SHPO recommends a professional historical survey to formally document the trestles and any other historic properties along the line, the SHPO states that a reconnaissance-level archaeological survey would be adequate. Therefore, SEA recommended in the EA that, pending completion of the SHPO's review, a condition be imposed requiring GNR to retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

Comments on the EA were due by October 11, 2004. Based on comments received from the Nez Perce Tribe confirming that a portion of the line is located on the Nez Perce Indian Reservation, SEA recommended modifying the historic preservation condition in its EA to require GNR to submit the results of its archaeological and historical surveys of the line to both the SHPO and the Nez Perce Tribe for review and comment.

Based on comments expressing concerns related to the bridges and railroad trestles on Orofino Creek, SEA also recommended that a condition be imposed requiring that GNR contact IDEQ, the Idaho Department of Lands (IDL), Clearwater County, and the Orofino Chamber of Commerce (OCC) prior to commencement of salvage activities to discuss local concerns regarding the safety and condition of the bridges and railroad trestles on Orofino Creek.

---

<sup>1</sup> In addition to the State's comments, the Lewiston Regional Office of IDEQ submitted comments in a letter dated April 20, 2004. These comments are addressed together.

The environmental conditions recommended by SEA will be imposed. Based on SEA's recommendation, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

As previously noted, on August 10, 2004, Clearwater County filed a request for the issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for imposition of a public use condition under 49 U.S.C. 10905. Clearwater County has submitted a statement of willingness to assume financial responsibility for the right-of-way, and has acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 1152.29. By letter filed on October 13, 2004, GNR states that it is willing to negotiate with Clearwater County for interim trail use. Because Clearwater County's request complies with the requirements of 49 CFR 1152.29, and GNR is willing to enter into trail use negotiations, we will issue a NITU for the subject line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, GNR may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

SEA has indicated in its EA that, following abandonment and salvage of the line, the right-of-way may be suitable for other public use. Clearwater County requests imposition of a 180-day public use condition prohibiting GNR from: (1) disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures such as bridges, trestles, culverts, and tunnels. Clearwater County states that there is a significant possibility that this rail corridor could be connected to a successful trail system while preserving the right-of-way for future opportunities, and that the rail structures it seeks to preserve have considerable value for recreational trail purposes. Clearwater County states that the 180-day period is needed to assemble and review title information, complete a trail plan, and commence negotiations with the carrier.

We have determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Trails). When the need for both conditions is established, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. Clearwater County has met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the period of time requested. Accordingly, a 180-day public use condition will be imposed on the rail line to be abandoned, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. If a trail use agreement is reached on a portion of the right-of-way,

GNR must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, GNR is not required to deal exclusively with Clearwater County, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Trails, 2 I.C.C.2d at 608, offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and the conditions that GNR shall: (1) leave intact all of the right-of-way, including bridges, trestles, culverts and tunnels (except track, ties, and signal equipment) for a period of 180 days from the effective date of this decision and notice, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; (2) comply with the terms and conditions for implementing interim trail use/rail banking as set forth below; (3) notify NGS 90 days prior to salvage activities that may disturb or destroy the geodetic station markers located on the line to plan for their relocation; (4) submit the results of its archaeological and historical surveys of the line to both the SHPO and Nez Perce Tribe for review and comment, and retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; (5) consult with the USACE prior to commencement of any salvage activities to determine if permits are required under section 404 of the Clean Water Act (33 U.S.C. 1344), and report the results of this consultation to SEA; (6) to ensure compliance with National Pollution Discharge Elimination System permitting requirements, consult with the EPA (Misha Vakoc at 206-553-6650) and IDEQ prior to commencement of any salvage activities; (7) consult with IDWR regarding protocol regulations and the

potential need for any permits prior to commencement of any salvage activities, and report the results of this consultation to SEA; (8) to address the concerns raised by IDEQ, prior to commencement of any salvage activities, contact IDEQ regarding water quality protection, specifically Idaho's Water Quality Standards and Wastewater Treatment Requirements under Idaho Administrative Rules 50.01.02; the removal and salvage methods to be used by GNR during the proposed abandonment; sediment and erosion control; bridge and culvert maintenance; procedures to prevent leaching of wood preservatives from treated wood surfaces; procedures to identify and clean up debris and contaminated areas; and a hazardous material contingency plan that includes IDEQ notification, in the event hazardous substances are discovered during salvage activities, and report the results of this consultation to SEA; and (9) to discuss local concerns regarding the safety and condition of the bridges and railroad trestles on Orofino Creek, contact Clearwater County, OCC, IDEQ, and IDL prior to commencement of salvage activities.

2. GNR is directed to serve a copy of this decision and notice on any former shippers that are still located on the line within 5 days after the service date of this decision and to certify to the Board that it has done so.

3. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for the management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

5. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, GNR may fully abandon the line, provided the conditions imposed above are met.

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by November 10, 2004, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,200.

See Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services—2004 Update, STB Ex Parte No. 542 (Sub-No. 11) (STB served Oct. 1, 2004).

8. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

9. Provided no OFA has been received, this exemption will be effective on December 1, 2004. Petitions to stay must be filed by November 16, 2004; petitions to reopen must be filed by November 26, 2004.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), GNR shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by GNR’s filing of a notice of consummation by November 1, 2005, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams  
Secretary